STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the State of Michigan Court of Appeals

DAYLE TRENTADUE, as Personal Representative of the Estate of MARGARETTE F. EBY, Deceased,
Plaintiff-Appellee

v

BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORTON, LAURENCE W. GORTON, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS and CARL L. BEKOFSKE, as Personal Representative of the Estate of RUTH R. MOTT, Deceased,
Defendants,

and

MFO MANAGEMENT COMPANY,
Defendant-Appellant.

SC: 128623, 128624, 128625
COA: 252155, 252207, 252209
Genesee CC: 02-074145-NZ

# Brief on Appeal – *Amici Curiae* in Support of Plaintiff-Appellee

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For nearly 35 years, this Court has consistently held that, under MCL 600.5827, a cause of action does not accrue until a plaintiff knows or through the exercise of reasonable diligence ought to know that he has suffered an injury. The discovery rule has been recognized in *Connelly v. Paul Ruddy's Equipment Repair & Service Co.*, 388 Mich. 146, 150, 200 N.W.2d 70, 72 (2001) ("Once all of the elements of an action for personal injury, including the element of damages, are present, the claim accrues and the statute of limitations begins to run.").

This principle was reiterated in *Moll v. Abbott Laboratories*, 444 Mich. 1, 506 N.W.2d 816 (1993), cited *supra*. There, this Court further solidified the holding in *Connelly* by making it clear that its interpretation of MCL 600.5827 was required by "common sense." *Moll*, 444 Mich. at 11-12, 506 N.W.2d at 822. [*Larson* discussion] This rule is in keeping with the law in the vast majority of states.[1]

This Court is currently considering whether to abandon the discovery rule in Michigan. These *amici* suggest that Michigan should retain the discovery rule because (1) the retention of the discovery rule is necessary and appropriate as a matter of fundamental justice, (2) the doctrine of *stare decisis* demands the retention of the discovery rule, and (3) interpreting MCL 600.5827 to limit a cause of action by the date of the defendant's conduct would violate the Due Process Clauses of the Michigan and United States Constitutions.

## I. The retention of the discovery rule is necessary and appropriate as a matter of fundamental justice

Over the course of four decades, this Court has repeatedly interpreted MCL 600.5827 in a consistent fashion: that the citizens of Michigan are able to find redress for torts committed

[1] *See, e.g., Sawtell v. E.I. du Pont de Nemours and Co., Inc.*, 22 F.3d 248, 250-51 (10th Cir. 1994) (collecting cases and concluding that "In most states, however, a plaintiff's lack of knowledge of a product's defect causing personal injury affects the statute of limitations if a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of such cause." *Id.*) Erickson *v. Scotsman, Inc.*, 456 N.W.2d 535, 536 (N.D. 1990) (quoting 4 American Law of Products Liability 3d, *Limitations of Actions* § 47:16 (1987) and citing 2A Frumer & Friedman, *Products Liability* §§ 12.02[2], 12.04[4] (1988)) ("'the general rule is that the cause of action accrues at the time of injury' when such actions are grounded upon negligence or strict liability.").

against them. To that end, Michigan recognizes that a cause of action does not accrue until the plaintiff is able to discovery, through reasonable diligence, all the elements of the cause of action. *Moll v. Abbott Laboratories*, 444 Mich. 1, 5, 506 N.W.2d 816 (1993). Under Michigan law, a personal injury action requires a showing of damages. *See, e.g., Connelly v. Paul Ruddy's Equipment Repair & Service Co.*, 388 Mich. 146, 150, 200 N.W.2d 70, 71 (2001) ("the plaintiff must have suffered damages" to recover in a personal injury action.). Where a defendant's negligence produces a disease with a latency period, an injury might not develop for several years after all the other elements of a cause of action are complete. Since damages are not provable for a period of many years, courts in Michigan and around the country apply the discovery rule in such cases.

The reason courts have adopted a discovery rule is to avoid an absurd situation where an injured plaintiff is unable to know that he has a cause of action until it is time-barred. As this Court has eloquently noted in the past,

> [T]he term 'wrong,' as used in the accrual statute [MCL 600.5827], specifie[s] the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which the defendant breached his duty. Common sense dictate[s] such an interpretation because, if the date of the defendant's breach designated the date of accrual, then the plaintiff's claim could be barred before a plaintiff suffers an injury.

*Moll*, 444 Mich. at 11-12, 506 N.W.2d at 822 (citing *Connelly v. Paul Ruddy's Co.*, 388 Mich. 146, 200 N.W.2d 70 (1972)). In a footnote, this Court went on to quote from the District Court for the Eastern District of Pennsylvania:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before the cause of action exists, i.e., before a judicial remedy is available to the plaintiff.

*Patterson v. Her Majesty Industries*, 450 F.Supp. 425, 428 (E.D. Pa. 1978) (other citations omitted).

**II. The doctrine of *stare decisis* demands the retention of the discovery rule.**

Like many state courts and the Supreme Court of the United States, Michigan has long recognized the value of *stare decisis*. As this Court has stated:

> In determining whether to overrule a prior case, pursuant to the doctrine of *stare decisis*, this Court should first consider whether the earlier case was wrongly decided. If it was wrongly decided, the Court should then examine reliance interests: whether the prior decision defies "practical workability"; whether the prior decision has become so embedded, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations; whether changes in the law or facts no longer justify the prior decision; and whether the prior decision misread or misconstrued a statute.

*Cameron v. Auto Club Ins. Ass'n*, 718 N.W.2d 784, 813 (Mich. 2006) (citing *Robinson v. Detroit,* 462 Mich. 439, 464-467, 613 N.W.2d 307 (2000)). This Court's decisions applying a discovery rule satisfies these guidelines, and should be upheld under the doctrine of *stare decisis* because (A) the decisions recognizing a discovery rule were correctly decided, (B) the discovery rule is workable, (C) a change in the discovery rule would have a drastic effect on plaintiffs' rights, and (D) the statute of limitations has not changed since this Court adopted a discovery rule.

A. <u>The decisions recognizing a discovery rule were correctly decided.</u>

The introduction to this brief recited the rationale behind this Court's adoption of a discovery rule. The only sensible way to interpret the statute of limitations is to realize that, unless a potential plaintiff has an opportunity to discovery his own injury, he can never have a cause of action at all, since any cause of action in negligence or strict liability requires a showing of damages.

As Part II of this brief will discuss, any interpretation of MCL 600.5827 that does not recognize a discovery rule would violate due process under both the Michigan and United States

Constitutions. At the very least, an interpretation that cuts off plaintiffs' rights would raise a serious constitutional issue. This Court has in the past interpreted the statute to avoid that issue, which is the proper course of action to take. "[I]nterpretations which avoid confrontations between statutes and the constitution are generally favored." *Smith v. Department of Public Health*, 428 Mich. 540, 641, 410 N.W.2d 749, 793 (1987) (Boyle, J., concurring in part and dissenting in part, citing *Traverse City School Dist. V. Attorney General*, 384 Mich. 390, 406, 195 N.W.2d 9 (1971)).[2]

For these reasons, this Courts previous decisions were correctly decided, and should be upheld under *stare decisis*.

B. The discovery rule is workable.

The present interpretation of MCL 600.5827 has been in place since the *Connelly* decision of 1972, *supra*. In the almost 35 years since that decision, there has been no indication that the discovery rule is unworkable; to the contrary, the proliferation of the discovery rule around the country should be indication enough of workability. Even in jurisdictions that do not recognize a discovery rule, a cause of action will generally not accrue until there is an actual injury. *See, e.g., Atwood v. Sturm, Ruger & Co.*, 823 P.2d 1064 (Utah 1992) (accrual on date of the injury); *Erickson v. Scotsman, Inc.*, 456 N.W.2d 535 (N.D. 1990) (accrual at the time of the injury).

C. A change in the discovery rule would have a drastic effect on plaintiffs' rights.

Cutting off several plaintiffs' actions before they even know of their rights would appear to be the very definition of a "practical real-world dislocation." *Cameron*, 718 N.W.2d at 813. If people are to have confidence in the court system, they must trust that they can find redress

[2] *See also Taylor v. State*, 360 Mich. 146, 154, 103 N.W.2d 769, 772-73 (1960) (citing *United States v. Lovett*, 328 U.S. 303, 320 (Frankfurter, J., concurring)) ("[F]ew principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort.").

when they discover that they have been wrongly injured. It would be of great surprise and dismay for a citizen of Michigan to discover that his state, unlike almost every other state in the Union, no longer allows him compensation for torts committed upon him for no reason other than that his injury took too long to develop.

D. The statute of limitations has not changed since this Court adopted a discovery rule.

It is significant that the language of the statute itself has not changed. In the past 35 years the legislature has not deemed it necessary to alter MCL 600.5827, despite knowledge of all the decisions in this state applying a discovery rule.[3] The consistent re-enactment of the same language indicates that the discovery rule decisions were correctly decided.

Circumstances like those presented here have caused the Supreme Court of the United States to state that "considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Hilton v. South Carolina Public Railways* Commission, 502 U.S. 197, 202 (1991) (citations omitted). Applying that principle, the *Hilton* opinion went on to note that:

> Congress has had almost 30 years in which it could have corrected our [previous] decision [construing the statute in question] if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.

*Id.*

Because this Court has long recognized the importance of the discovery rule, because the legislature has not changed the statute in question for over 30 years, and because abandoning the

[3] "[I]t is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law[.]" *Pulver v. Dundee Cement Co.*, 445 Mich. 68, 75, 515 N.W.2d 728, 732 (1994) (citations omitted).

discovery rule would "dislodge settled rights" of plaintiffs, this Court should not overrule the decisions recognizing the discovery rule.

## III. Interpreting MCL 600.5827 to limit a cause of action by the date of the defendant's conduct would violate the Due Process Clauses of the Michigan and United States Constitutions.

### A. Barring a cause of action before it accrues would contravene long-established Michigan constitutional law.

This Court has long recognized a fundamental right of access to courts. As early as 1877, this right was recognized as paramount. "Every man is entitled to his day in court before his rights can be finally disposed of, and even the Legislature could not deprive him of the right." *Ehlers v. Stoeckle*, 37 Mich. 261 (1877). This court has recognized that this right must be preserved in the context of statutes of limitations. *Price v. Hopkin*, 13 Mich. 318, 324 (1865); *Dyke v. Richard*, 390 Mich. 739, 746, 213 N.W.2d 185, 188 (1973) ("[T]he legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away.").

The fundamental right, acknowledged in the foregoing cases, of access to the court is part of the very fabric of Anglo-American jurisprudence, firmly rooted in such iconic texts as the Magna Carta, Coke's *Institutes*, Blackstone's *Commentaries*, and *Marbury v. Madison*. Chapter 29 of Magna Carta provided: "To none will we sell, to none will we deny or delay, right or justice." Magna Carta, c. 29 [c. 40 of King John's Charter of 1215; c. 29 of King Edward's Charter of 1297] (1225), *quoted in Scholle v. Hare*, 367 Mich. 176, 185, 116 N.W.2d 350, 353 (1962). Sir Edward Coke explained the effect of this guaranty as follows:

> [E]very subject . . . for injury done to him . . . , by any other subject, . . . without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.

Coke, The Second Part of the Institutes of the Laws of England 55 (Brooke, 5th ed. 1797), *quoted in Klopfer v. North Carolina*, 386 U.S. 213 (1967). In the seminal case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), the Supreme Court observed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." The Court quoted Blackstone to the effect that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . . [E]very right, when withheld, must have a remedy, and every injury its proper redress." *Id.* (citation omitted). The *Marbury* Court concluded: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.*

B. Unless narrowly tailored to a compelling justification, barring a cause of action before it accrues would violate the United States Constitution.

Under the Fourteenth Amendment to the Constitution of the United States, statutes that impinge upon a fundamental right are "presumptively invidious" and must be "precisely tailored to serve a compelling governmental interest." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). The United States Supreme Court has repeatedly recognized the fundamental importance of the right of access to courts. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."). *Cf. Gale v. Providence Hosp.*, 118 Mich. App. 405, 325 N.W.2d 439 (1982) (citing *Wolff*).

An interpretation of MCL 600.5827 that cut off a cause of action before a plaintiff could know of an injury would deprive a large identifiable class of claimants of access to the courts for

redress of wrong. Hence, this Court must strictly scrutinize any such proposed interpretation to determine whether the statute, as so interpreted, is precisely tailored to serve a compelling governmental interest.

The Supreme Court has defined a compelling state interest as "only those interests of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Examples of compelling interests include maintaining the tax system, *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989), and protecting children's welfare, *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). On the other hand, for example, interests advanced by the bankruptcy system are not compelling. *In re Young* , 82 F.3d 1407, 1420 (8th Cir. 1996).

In the present case, the legislature has never articulated any interest in barring a victim's claim before he has an opportunity to discover it, notwithstanding its presumed awareness of this Court's longstanding interpretation of the limitations period under MCL 600.5827 as commencing only after a plaintiff suffers injury. At a minimum, the state and federal constitutional issues raised by the proposed abrogation of the discovery rule are real and substantial and ought not lightly be brushed aside. To elevate a purported state interest that has never been embraced by the legislature to such a stature that it would override a long-recognized fundamental right of Michigan citizens would be an inappropriate exercise of judicial authority under the circumstances of this case. Cf. *Taylor v. State*, 360 Mich. 146, 154, 103 N.W.2d 769, 772-73 (1960) ("few principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort.") (citing *United States v. Lovett*, 328 U.S. 303, 320 (Frankfurter, J., concurring)).

## IV. Conclusion

For the foregoing reasons, this Court should retain the discovery rule, in keeping with justice, constitutional principles, and its own longstanding caselaw.

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Respectfully Submitted,

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